

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1939.

No. 7344

GEORGE M. MILLER, APPELLANT,

vs.

PANSY A. CLARK.

and

No. 7345

GEORGE M. MILLER, APPELLANT,

vs.

BAILEY E. CLARK.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 17, 1939

PRINTED AUGUST 24, 1939

423



United States Court of Appeals for the District of Columbia

JANUARY TERM, 1939.

Nos. 7344 & 7345

GEORGE M. MILLER, APPELLANT,

vs.

PANSY A. CLARK, APPELLEE,

and

GEORGE M. MILLER, APPELLANT,

vs.

BAILEY E. CLARK, APPELLEE.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

a. District Court of the United States for the
District of Columbia

No. 88,398.

PANSY A. CLARK, *Plaintiff*,

vs.

GEORGE M. MILLER, *Defendant*.

and

No. 88,399

BAILEY E. CLARK, *Plaintiff*,

vs.

GEORGE M. MILLER, *Defendant*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the
United States for the District of Columbia, at the
City of Washington, in said District, at the times
hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled
causes, to wit:

1 Filed June 9, 1938

In the District Court of the United States for the District
of Columbia

Holding A Circuit Court

No. 88,398.

PANSY A. CLARK, 2305 Nichols Avenue, S. E. Washington,
D. C., *Plaintiff*,

vs.

GEORGE M. MILLER, 4009 Gault Place, N. E. Washington,
D. C., *Defendant*.

Amended Declaration

Count 1.

The plaintiff, Pansy A. Clark, sues the defendant, George
M. Miller, for that heretofore, to-wit, on October 27, 1936,

the plaintiff was a pedestrian walking in a southerly direction along Nichols Avenue, S. E. in the District of Columbia, at or near its intersection with Chicago Street, and was at the end of the block in the act of descending from the curb into the crosswalk at the northwest corner of the intersection of said highways. And the defendant, George M. Miller, was then and there in the ownership, operation and control of a certain motor vehicle, to-wit, an automobile truck, which the defendant was propelling in a southerly direction along said Nichols Avenue, at or near its intersection with Chicago Street. And it then and there became and was the duty of the defendant in the operation, management and control of such motor vehicle to exercise and use due care and diligence so as to avoid colliding with vehicles or pedestrians then and there using the highways.

But in spite of the duty thus incumbent upon the defendant, he, the said defendant, did disregard the same and did carelessly, negligently and recklessly operate such motor vehicle, in that he failed to maintain a proper lookout; failed to keep his motor vehicle under proper control; failed to give such timely warning of his approach to the intersection of the highways aforementioned, so as to warn the plaintiff of the same; failed to observe paragraphs (b) and (c), Section 22 of Article 6 of the Traffic and Motor Vehicle Regulations then existing for the District of Columbia, which are in the following language:

(b) No person shall drive a vehicle upon a highway at a greater speed than is reasonable and prudent, having due regard to the traffic, surface and width of the highway, and the hazard at intersections, and any other conditions then existing.

(c) The speed of any vehicle on any street, highway, or bridge in the District of Columbia shall not exceed 22 miles per hour, except as hereinafter specifically provided, or as may otherwise be indicated by official signs: * * *

failed to observe paragraph (a), Section 5 of Article 3 of such Traffic and Motor Vehicle Regulations, which provides as follows:

(a) The driver of any vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at the end of a block, except at intersections where the movement of traf-

fic is being regulated by police officers or traffic-control signals, or at any point where a pedestrian tunnel has been provided.

and failed to observe paragraph (a), Section 28 of Article 6, which provides as follows:

(a) A vehicle approaching an intersection shall slow down and be kept under such control as to avoid colliding with pedestrians or vehicles.

Wherefore and by reason of which negligence the defendant did cause his vehicle to run down and collide with the plaintiff, and did thereby violently and forcefully knock the plaintiff to the roadway, causing her severe, painful and permanent injuries as a result of which it became necessary to carry the plaintiff to Casualty Hospital, located in the District of Columbia, where plaintiff was confined for a long period of time. And plaintiff was thereafter removed to her home where she was and will be confined for an extensive period of time in an immobile condition, as a result of her injuries.

And the plaintiff, as a result of the impact aforementioned, suffered severe contusions, abrasions and lacerations to her head, shoulders and body, causing her intense and exeruciating pain, both by day and night, resulting

3 in great shock to her physical and nervous systems; plaintiff was obliged to and did undergo a surgical operation, in that as a result of the impact she suffered a compound comminuted fracture of the left tibia and a fracture of the left fibula, so as to make an open reduction of the same necessary, whereby her left leg was rendered immobile for a long period of time through means of a cast applied to the same; plaintiff has suffered and will suffer a stiffening of the ankle, knee and hip joints, and a general swelling of the left leg, with resultant pain therefrom, and plaintiff will in all likelihood suffer a shortening of her left leg.

And plaintiff states that as a result of the injuries thus occasioned to her, she has been and will be deprived of her customary way of life, in that she has been unable and will in the future be unable to perform her usual duties and to enjoy her usual recreations, with resulting harm to her general physical condition, as well as to her nervous system.

Count 2.

The plaintiff, Pansy A. Clark, sues the defendant, George M. Miller, for that heretofore, to-wit, on October 27, 1936, the plaintiff was a pedestrian walking in a southerly direction along Nicholas Avenue, S. E., in the District of Columbia, at or near its intersection with Chicago Street, and had reached the point of and was proceeding through the crosswalk located at the northwest corner of the intersection of said highways. And the defendant, George M. Miller, was then and there in the ownership, operation and control of a certain motor vehicle, to-wit, an automobile truck, which the defendant was propelling in a southerly direction along said Nichols Avenue, at or near its intersection with Chicago Street. And it then and there became and was the duty of the defendant in the operation, management and control of such motor vehicle to exercise and use due care and diligence so as to avoid colliding with vehicles or pedestrians then and there using the highways.

4 But in spite of the duty thus incumbent upon the defendant, he, the said defendant, did disregard the same and did carelessly, negligently and recklessly operate such motor vehicle, in that he failed to maintain a proper lookout; failed to keep his motor vehicle under proper control; failed to give such timely warning of his approach to the intersection of the highways aforementioned, so as to warn the plaintiff of the same; failed to observe paragraphs (b) and (c), Section 22 of Article 6 of the Traffic and Motor Vehicle Regulations then existing for the District of Columbia, which are in the following language:

(b) No person shall drive a vehicle upon a highway at a greater speed than is reasonable and prudent, having due regard to the traffic, surface, and width of the highway, and the hazard at intersections, and any other conditions then existing.

(c) The speed of any vehicle on any street, highway, or bridge in the District of Columbia shall not exceed 22 miles per hour, except as hereinafter specifically provided, or as may otherwise be indicated by official signs: * * *

failed to observe paragraph (a), Section 5 of Article 3 of such Traffic and Motor Vehicle Regulations, which provides as follows:

(a) The driver of any vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at the end of a block, except at intersections where the movement of traffic is being regulated by police officers or traffic-control signals, or at any point where a pedestrian tunnel has been provided.

and failed to observe paragraph (a), Section 28 of Article 6, which provides as follows:

(a) A vehicle approaching an intersection shall slow down and be kept under such control as to avoid colliding with pedestrians or vehicles.

Wherefore and by reason of which negligence the defendant did cause his vehicle to run down and collide with the plaintiff, and did thereby violently and forcefully knock the plaintiff to the roadway, causing her severe, painful and permanent injuries as a result of which it became necessary to carry the plaintiff to Casualty Hospital, located in the District of Columbia, where plaintiff was confined for a long period of time. And plaintiff
5 was thereafter removed to her home where she was and will be confined for an extensive period of time in an immobile condition, as a result of her injuries.

And the plaintiff, as a result of the impact aforementioned, suffered severe contusions, abrasions and lacerations to her head, shoulders and body, causing her intense and excruciating pain, both by day and night, resulting in great shock to her physical and nervous systems; plaintiff was obliged to and did undergo a surgical operation, in that as a result of the impact she suffered a compound comminuted fracture of the left tibia and a fracture of the left fibula, so as to make an open reduction of the same necessary, whereby her left leg was rendered immobile for a long period of time through means of a cast applied to the same; plaintiff has suffered and will suffer a stiffening of the ankle, knee and hip joints, and a general swelling of the left leg, with resultant pain therefrom, and plaintiff will in all likelihood suffer a shortening of her left leg.

And plaintiff states that as a result of the injuries thus occasioned to her, she has been and will be deprived of her customary way of life, in that she has been unable and will in the future be unable to perform her usual duties and to enjoy her usual recreations, with resulting harm to her general physical condition, as well as to her nervous system.

Count 3.

The plaintiff, Pansy A. Clark, sues the defendant, George M. Miller, for that heretofore, to-wit, on October 27, 1936, the plaintiff was a pedestrian walking in a southerly direction along Nichols Avenue, S. E., in the District of Columbia, at or near its intersection with Chicago Street. And the plaintiff states that she was in the act of crossing or attempting to cross said Chicago Street at the northwest corner of the intersection of the two named highways. And the defendant, George M. Miller, was then and there in the ownership, operation and control of a certain motor vehicle, to-wit, an automobile truck, which the defendant was propelling in a southerly direction along said Nichols Avenue, at or near its intersection with Chicago Street. And it then and there became and was the duty of the defendant in the operation, management and control of such motor vehicle to exercise and use due care and diligence so as to avoid colliding with vehicles or pedestrians then and there using the highways.

And the plaintiff by reason of her not having seen or observed the approach of the defendant's vehicle, had placed herself in a position of peril as she was crossing or attempting to cross the aforementioned intersection at the point indicated; but the defendant, in the exercise of due care and caution, and such as the circumstances then and there required of him, saw or could have seen the perilous position of the plaintiff in time so as to avoid colliding with her, yet the defendant failing in such duty did not exercise such due care or caution and did fail to bring his motor vehicle to a stop.

Wherefore and by reason of which negligence the defendant did cause his vehicle to run down and collide with the plaintiff, and did thereby violently and forcefully knock the plaintiff to the roadway, causing her severe, painful and permanent injuries as a result of which it became necessary

to carry the plaintiff to Casualty Hospital, located in the District of Columbia, where plaintiff was confined for a long period of time. And plaintiff was thereafter removed to her home where she was and will be confined for an extensive period of time in an immobile condition, as a result of her injuries.

And the plaintiff, as a result of the impact aforementioned, suffered severe contusions, abrasions and lacerations to her head, shoulders and body, causing her intense and excruciating pain, both by day and night, resulting in great shock to her physical and nervous systems; plaintiff was obliged to and did undergo a surgical operation, in

7 that as a result of the impact she suffered a compound comminuted fracture of the tibia and a fracture of the left fibula, so as to make an open reduction of the same necessary, whereby her left leg was rendered immobile for a long period of time through means of a cast applied to the same; plaintiff has suffered and will suffer a stiffening of the ankle, knee and hip joints, and a general swelling of the left leg, with resultant pain therefrom, and plaintiff will in all likelihood suffer a shortening of her left leg.

And plaintiff states that as a result of the injuries thus occasioned to her, she has been and will be deprived of her customary way of life, in that she has been unable and will in the future be unable to perform her usual duties and to enjoy her usual recreations, with resulting harm to her general physical condition, as well as to her nervous system.

And plaintiff claims damages against the defendant in the amount of Twenty Five Thousand Dollars (\$25,000.00).

CHAS. S. BAKER
BENJ. L. TEPPER
ROBT. H. MARCUS

Attorneys for Plaintiff.

I consent to filing
6/6/38

SAMUEL W. McCART
Attorney for Defendant

Filed June 9, 1938

In the District Court of the United States
For the District of Columbia

Holding a Circuit Court

No. 88,399

BAILEY E. CLARK, 2305 Nichols Ave., S.E., Washington, D. C.
Plaintiff,

GEORGE M. MILLER, 4009 Gault Place, N.E., Washington,
D. C. *Defendant.*

Amended Declaration

Count 1.

The plaintiff, Bailey E. Clark, sues the defendant, George M. Miller, for that heretofore, to-wit, on October 27, 1936, the wife of plaintiff, Pansy A. Clark, was a pedestrian walking in a southerly direction along Nichols Avenue, S. E. in the District of Columbia, at or near its intersection with Chicago Street, and was at the end of the block in the act of descending from the curb into the cross walk at the northwest corner of the intersection of said highways. And the defendant, George M. Miller, was then and there in the ownership, operation and control of a certain motor vehicle, to-wit, an automobile truck, which the defendant was propelling in a southerly direction along said Nichols Avenue, at or near its intersection with Chicago Street. And it then and there became and was the duty of the defendant in the operation, management and control of such motor vehicle to exercise and use due care and diligence so as to avoid colliding with vehicles or pedestrians then and there using the highways.

But in spite of the duty thus incumbent upon the defendant, he, the said defendant, did disregard the same and did carelessly, negligently and recklessly operate such motor vehicle, in that he failed to maintain a proper lookout; failed to keep his motor vehicle under proper control; failed to give such timely warning of his approach to the intersection of the highways aforementioned, so as to warn the plaintiff of the same, failed to observe paragraph (b) and (c), Section 22 of Article 6 of

the Traffic and Motor Vehicle Regulations then existing for the District of Columbia, which are in the following language:

(b) No person shall drive a vehicle upon a highway at a greater speed than is reasonable and prudent, having due regard to the traffic, surface, and width of the highway, and the hazard at intersections, and any other conditions then existing.

(c) The speed of any vehicle on any street, highway, or bridge in the District of Columbia shall not exceed 22 miles per hour, except as hereinafter specifically provided, or as may otherwise be indicated by official signs: * * * failed to observe paragraph (a), Section 5 of Article 3 of such Traffic and Motor Vehicle Regulations, which provides as follows:

(a) The driver of any vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at the end of a block, except at intersections where the movement of traffic is being regulated by police officers or traffic-control signals, or at any point where a pedestrian tunnel has been provided.

and failed to observe paragraph (a), Section 28 of Article 6, which provides as follows:

(a) A vehicle approaching an intersection shall slow down and be kept under such control as to avoid colliding with pedestrians or vehicles.

Wherefore and by reason of which negligence the defendant did cause his vehicle to run down and collide with the wife of the plaintiff, and did thereby violently and forcefully knock the wife of the plaintiff, to the roadway, causing her severe, painful and permanent injuries as a result of which it became necessary to carry the wife of the plaintiff to Casualty Hospital, located in the District of Columbia, where she was confined for a long period of time. And said wife of plaintiff was thereafter removed to her home where she was and will be confined for an extensive period of time in an immobile condition, as a result of her injuries.

And the wife of plaintiff, as a result of the impact aforementioned, suffered sever contusions, abrasions and lacerations to her head, shoulders and body causing her

10 intense and excruciating pain, both by day and night, resulting in great shock to her physical and nervous systems; plaintiff's said wife was obliged to and did undergo a surgical operation, in that as a result of the impact she suffered a compound comminuted fracture of the left tibia and a fracture of the left fibula, so as to make an open reduction of the same necessary, whereby her left leg was rendered immobile for a long period of time through means of a cast applied to the same; and plaintiff's said wife has suffered and will suffer a stiffening of the ankle, knee and hip joints, and a general swelling of the left leg, with resultant pain therefrom, and she will in all likelihood suffer a shortening of her left leg.

And plaintiff was obliged to and did secure the aid of physicians and surgeons for the cure of his wife, together with the necessary hospitalization, involving nurse attendance, the making of X-ray photographs, et cetera, at great cost and expense to himself.

And plaintiff states that by reason of the long hospitalization and immobility of his wife, due to her injuries as aforesaid, it became necessary for him to employ a maid servant to carry on and perform the usual and ordinary household duties which his wife otherwise performed; and further, that by reason of the long illness and convalescence of his wife, together with the great pain and suffering which she underwent and still undergoes, he was, in general thereby deprived of her companionship and services, and has suffered and will suffer loss of consortium to his great loss and detriment.

Count 2

The plaintiff, Bailey E. Clark, sues the defendant, George M. Miller, for that heretofore, to-wit, on October 27, 1936 the wife of plaintiff, Pansy A. Clark, was a pedestrian walking in a southerly direction along Nichols Avenue, S. E., in the District of Columbia, at or near its intersection with Chicago Street, and had reached the point of
and was proceeding through the crosswalk located
11 at the northwest corner of the intersection of said highways. And the defendant, George M. Miller, was then and there in the ownership, operation and control of a certain motor vehicle, to-wit, an automobile truck,

which the defendant was propelling in a southerly direction along said Nichols Avenue, at or near its intersection with Chicago Street. And it then and there became and was the duty of the defendant in the operation, management and control of such motor vehicle to exercise and use due care and diligence so as to avoid colliding with vehicles or pedestrians then and there using the highways.

But in spite of the duty thus incumbent upon the defendant, he, the said defendant did disregard the same and did carelessly, negligently and recklessly operate such motor vehicle, in that he failed to maintain a proper lookout; failed to keep his motor vehicle under proper control; failed to give such timely warning of his approach to the intersection of the highways aforementioned, so as to warn the plaintiff of the same; failed to observe paragraphs (b) and (c), Section 22 of Article 6 of the Traffic and Motor Vehicle Regulations then existing for the District of Columbia, which are in the following language:

(b) No person shall drive a vehicle upon a highway at a greater speed than is reasonable and prudent, having due regard to the traffic, surface, and width of the highway, and the hazard at intersections, and any other conditions then existing.

(c) The speed of any vehicle on any street, highway, or bridge in the District of Columbia shall not exceed 22 miles per hour, except as hereinafter specifically provided, or as may otherwise be indicated by official signs: * * * failed to observe paragraph (a), Section 5 of Article 3 of such Traffic and Motor Vehicle Regulations, which provides as follows:

(a) The driver of any vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at the end of a block, except at intersections where the movement of traffic is being regulated by police officers or traffic-control signals, or at any point where a pedestrian tunnel has been provided.

and failed to observe paragraph (a), Section 28 of Article 6, which provides as follows:

12 (a) A vehicle approaching an intersection shall slow down and be kept under such control as to avoid colliding with pedestrians or vehicles.

Wherefore and by reason of which negligence the defen-

dant did cause his vehicle to run down and collide with the wife of the plaintiff, and did thereby violently and forcefully knock the wife of the plaintiff to the roadway, causing her severe, painful and permanent injuries as a result of which it became necessary to carry the wife of the plaintiff to Casualty Hospital, located in the District of Columbia, where she was confined for a long period of time. And said wife of plaintiff was thereafter removed to her home where she was and will be confined for an extensive period of time in an immobile condition, as a result of her injuries.

And the wife of plaintiff, as a result of the impact aforementioned, suffered severe contusions, abrasions and lacerations to her head, shoulders and body, causing her intense and excruciating pain, both by day and night, resulting in great shock to her physical and nervous systems; plaintiff's said wife was obliged to and did undergo a surgical operation, in that as a result of the impact she suffered a compound comminuted fracture of the left tibia and a fracture of the left fibula, so as to make an open reduction of the same necessary, whereby her left leg was rendered immobile for a long period of time through means of a cast applied to the same; and plaintiff's said wife has suffered and will suffer a stiffening of the ankle, knee and hip joints, and a general swelling of the left leg, with resultant pain therefrom, and she will in all likelihood suffer a shortening of her left leg.

And plaintiff was obliged to and did secure the aid of physicians and surgeons for the cure of his wife, together with the necessary hospitalization, involving nurse attendance, the making of X-ray photographs, et cetera, at great cost and expense to himself.

And plaintiff states that by reason of the long hospitalization and immobility of his wife, due to her injuries as aforesaid, it became necessary for him to employ a
13 maid servant to carry on and perform the usual and ordinary household duties which his wife otherwise performed; and further, that by reason of the long illness and convalescence of his wife, together with the great pain and suffering which she underwent and still undergoes, he was, in general, thereby deprived of her companionship and services, and has suffered and will suffer loss of consortium to his great loss and detriment.

Count 3

The plaintiff, Bailey E. Clark, sues the defendant, George M. Miller, for that heretofore, to-wit, on October 27, 1936, the wife of plaintiff, Pansy A. Clark, was a pedestrian walking in a southerly direction along Nichols Avenue S. E. in the district of Columbia, at or near its intersection with Chicago Street. And the plaintiff states that she was in the act of crossing or attempting to cross said Chicago Street at the northwest corner of the intersection of the two named highways. And the defendant, George M. Miller was then and there in the ownership, operation and control of a certain motor vehicle, to-wit, an automobile truck, which the defendant was propelling in a southerly direction along said Nichols Avenue, at or near its intersection with Chicago Street. And it then and there became and was the duty of the defendant in the operation, management and control of such motor vehicle to exercise and use
14 due care and diligence so as to avoid colliding with vehicles or pedestrians then and there using the highways.

And the wife of plaintiff by reason of her not having seen or observed the approach of the defendant's vehicle, had placed herself in a position of peril as she was crossing or attempting to cross the aforementioned intersection at the point indicated; but the defendant, in the exercise of due care and caution, and such as the circumstances then and there required of him, saw or could have seen the perilous position of the wife of plaintiff in time so as to avoid colliding with her, yet the defendant failing in such duty did not exercise such due care or caution and did fail to bring his motor vehicle to a stop.

Wherefore and by reason of which negligence the defendant did cause his vehicle to run down and collide with the wife of the plaintiff, and did thereby violently and forcefully knock the wife of the plaintiff to the roadway, causing her severe, painful and permanent injuries as a result of which it became necessary to carry the wife of the plaintiff to Casualty Hospital, located in the District of Columbia, where she was confined for a long period of time. And said wife of plaintiff was thereafter removed to her home where she was and will be confined for an extensive period

of time in an immobile condition, as a result of her injuries.

And the wife of plaintiff, as a result of the impact
15 aforementioned, suffered severe contusions, abrasions and lacerations to her head, shoulders and body, causing her intense and excruciating pain, both by day and night, resulting in great shock to her physical and nervous systems; plaintiff's said wife was obliged to and did undergo a surgical operation, in that as a result of the impact she suffered a compound comminuted fracture of the left tibia and a fracture of the left fibula, so as to make an open reduction of the same necessary, whereby her left leg was rendered immobile for a long period of time through means of a cast applied to the same; and plaintiff's said wife has suffered and will suffer a stiffening of the ankle, knee and hip joints, and a general swelling of the left leg, with resultant pain therefrom, and she will in all likelihood suffer a shortening of her left leg.

And plaintiff was obliged to and did secure the aid of physicians and surgeons for the cure of his wife, together with the necessary hospitalization, involving nurse attendance, the making of X-ray photographs, et cetera, at great cost and expense to himself.

And plaintiff states that by reason of the long hospitalization and immobility of his wife, due to her injuries as aforesaid, it became necessary for him to employ a maid servant to carry on and perform the usual and ordinary household duties which his wife otherwise performed; and further, that by reason of the long illness and convalescence of his wife, together with the great pain and suffering which she underwent and still undergoes, he was, in general, thereby deprived of her companionship and services, and has suffered and will suffer loss of consortium to his great loss and detriment.

And plaintiff claims damages against the defendant in the amount of Five Thousand Dollars (\$5,000.00).

CHAS. S. BAKER
BENJ. L. TEPPER
ROBT. H. MARCUS

Attorneys for Plaintiff.

I consent to filing 6/6/38

SAMUEL W. McCART
Attorney for Defendant

16 No. 88398

Filed June 9, 1938

Defendant's Amended Plea to Counts 1 & 2

Now comes the defendant George M. Miller, by his attorney, and for plea to the first and second counts of the amended declaration filed herein by the plaintiff Pansy A. Clark admits that just prior to the time alleged in the declaration he was operating a motor vehicle in a southerly direction along Nichols Avenue, S. E., Washington, D. C., at or near its intersection with Chicago Street; and he avers that he was completing a right turn from a southerly direction on Nichols Avenue to a westerly direction on Chicago Street; he denies that he operated said automobile carelessly, negligently, or recklessly; he denies that he failed to maintain a proper lookout; he denies that he failed to keep said motor vehicle under proper control; he denies that any occasion arose which required him to give warning of his approach; he denies that he failed to observe paragraphs (b) and (c) Section 22 of Article 6 and paragraph (a), Section 5 of Article 3 and paragraph (a), Section 28 of Article 6 of the Traffic and Motor Vehicle Regulations then existing for the District of Columbia and set further in the declaration; he denies that he ran down and collided with the plaintiff and he denies that he has any information sufficient to form a belief as to the injuries to the plaintiff as alleged in the declaration but insofar as they are material he demands strict proof thereof. He denies every allegation of the declaration not herein specifically admitted or denied.

17 Defendant further says that just prior to the time alleged in the declaration he was lawfully and carefully operating his said motor vehicle in a southerly direction along said Nichols Avenue at or near its intersection with Chicago Street and that he was completing a right turn from a southerly direction on Nichols Avenue to a westerly direction on Chicago Street, and that at said time the plaintiff owed to herself and to the defendant a duty to exercise due care and a duty to look for approaching vehicles, before entering the crosswalk at said intersection and while crossing on said crosswalk, so as to avoid colliding with vehicles lawfully crossing the crosswalk; yet in violation of her said duty the plaintiff did carelessly,

negligently, and recklessly step into the west crosswalk at the said intersection, did fail to keep a lookout for the motor vehicle then and there being operated by the defendant and did fail to yield the right of way to the defendant's motor vehicle and did negligently and carelessly cause herself to walk into and collide with the side of said motor vehicle then and there being operated by the defendant and through her negligence as aforesaid brought upon herself any injuries which she may have sustained at the time and place alleged.

Defendant's Plea to Count 3

Now comes the defendant, George M. Miller, by his attorney, and for plea to the third count of the declaration filed herein by the plaintiff Pansy A. Clark admits that just prior to the time alleged in the declaration he was operating a motor vehicle in a southerly direction along Nichols Ave., S. E., Washington, D. C., at or near its intersection with Chicago Street and he avers that he was completing a right turn from a southerly direction on Nichols Avenue to a westerly direction on Chicago Street; he denies that the plaintiff placed herself in a position of peril of injury by the automobile which he was operating

18 or that the plaintiff gave him any notice or warning that she would assume any position of peril as to his said automobile; and defendant denies that he was negligent in any manner and at any time insofar as the operating of his said automobile related to the injury complained of in the declaration; defendant denies that he caused his automobile to run down and collide with the plaintiff and he denies each and every allegation of the declaration not herein specifically denied.

Defendant denies knowledge of the injuries and damages to the plaintiff sufficient to plead thereto but demands strict proof of the injuries and damages alleged.

Defendant further says that just prior to the time alleged in the declaration he was lawfully and carefully operating his said motor vehicle in a southerly direction along said Nichols Avenue at or near its intersection with Chicago Street and that he was completing a right turn from a southerly direction on Nichols Avenue to a westerly direction on Chicago Street, and that at the said time

the plaintiff owed to herself and to the defendant a duty to exercise due care and a duty to look for approaching vehicles, before entering the crosswalk at said intersection and while crossing on said crosswalk, so as to avoid colliding with vehicles lawfully crossing the crosswalk; yet in violation of her said duty the plaintiff did carelessly, negligently, and recklessly step into the west crosswalk at the said intersection, did fail to keep a lookout for the motor vehicle then and there being operated by the defendant and did fail to yield the right-of-way to the defendant's motor vehicle and did negligently and carelessly cause herself to walk into and collide with the side of said motor vehicle then and there operated by the defendant and through her negligence as aforesaid brought upon herself any injuries which she may have sustained at the time and place alleged.

SAMUEL W. McCART

Attorney for Defendant

19 No. 88399

Filed June 9, 1938

Defendant's Amended Plea to Counts 1 & 2

Now comes the defendant George M. Miller, by his attorney, and for plea to the first and second counts of the amended declaration filed herein by the plaintiff Bailey E. Clark admits that just prior to the time alleged in the declaration he was operating a motor vehicle in a southerly direction along Nichols Ave, S. E., Washington, D. C., at or near its intersection with Chicago Street; and he avers that he was completing a right turn from a southerly direction on Nichols Avenue to a westerly direction on Chicago Street; he denies that he operated said automobile carelessly, negligently or recklessly; he denies that he failed to maintain a proper lookout; he denies that he failed to keep said motor vehicle under proper control; he denies that any occasion arose which required him to give warning of his approach; he denies that he failed to observe paragraphs (b) and (c), Section 22 of Article 6 and paragraph (a), Section 5 of Article 3 and paragraph (a), Section 28 of Article 6 of the Traffic and Motor Vehicle Regulations then existing for the District of Columbia and set further in the declaration; he denies that he ran down and collided with Pansy A. Clark and he denies

that he has any information sufficient to form a belief as to the damages to the plaintiff as alleged in the declaration but insofar as they are material he demands strict proof thereof. He denies every allegation of the declaration not herein specifically admitted or denied.

20 Defendant further says that just prior to the time alleged in the declaration he was lawfully and carefully operating his said motor vehicle in a southerly direction along said Nichols Avenue at or near its intersection with Chicago Street and that he was completing a right turn from a southerly direction on Nichols Avenue to a westerly direction on Chicago Street, and that at said time Pansy A. Clark owed to herself and to the defendant a duty to exercise due care and a duty to look for approaching vehicles, before entering the crosswalk, at said intersection and while crossing on said crosswalk, so as to avoid colliding with vehicles lawfully crossing the crosswalk; yet in violation of her said duty she did carelessly, negligently and recklessly step into the west crosswalk at the said intersection, did fail to keep a lookout for the motor vehicle then and there being operated by the defendant and did fail to yield the right-of-way to the defendant's motor vehicle and did negligently and carelessly cause herself to walk into and collide with the side of said motor vehicle then and there being operated by the defendant and through her negligence as aforesaid brought upon herself any injuries which she may have sustained at the time and place alleged and caused any resulting damage to the plaintiff.

Defendant's Plea to Count 3

Now comes the defendant George M. Miller, by his attorney, and for plea to the third count of the declaration filed herein by the plaintiff Bailey E. Clark admits that just prior to the time alleged in the declaration he was operating a motor vehicle in a southerly direction along Nichols Avenue, S. E., Washington, D. C., at or near its intersection with Chicago Street and he avers that he was completing a right turn from a southerly direction on Nichols Avenue to a westerly direction on Chicago Street; he denies that Pansy A. Clark placed herself in a position of peril of injury by the automobile which he was operating or that she gave to him any notice or warning that she would as-

21 sume any position of peril as to his said automobile; and defendant denies that he was negligent in any manner and at any time insofar as the operating of said automobile related to the injury complained of in the declaration; defendant denies that he caused his automobile to run down and collide with Pansy A. Clark and he denies each and every allegation of the declaration not herein specifically denied.

Defendant denies knowledge of the damages to the plaintiff sufficient to plead thereto but demands strict proof of the injuries and damages alleged.

Defendant further says that just prior to the time alleged in the declaration he was lawfully and carefully operating his said motor vehicle in a southerly direction along said Nichols Avenue at or near its intersection with Chicago Street and that he was completing a right turn from a southerly direction on Nichols Avenue to a westerly direction on Chicago Street, and that at the said time Pansy A. Clark owed to herself and to the defendant a duty to exercise due care and a duty to look for approaching vehicles, before entering the crosswalk at said intersection and while crossing on said crosswalk, so as to avoid colliding with vehicles lawfully crossing the crosswalk; yet in violation of her said duty she did carelessly, negligently and recklessly step into the west crosswalk at the said intersection, did fail to keep a lookout for the motor vehicle and did negligently and carelessly cause herself to walk into and collide with the side of said motor vehicle then and there being operated by the defendant and through her negligence as aforesaid brought upon herself any injuries which she may have sustained at the time and place alleged and caused any resulting damage to the plaintiff.

SAMUEL W. McCART

Attorney for Defendant

Verdict and Judgment

Filed November 18, 1938

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No. 88398

This cause having come on for hearing on the 16th day of November, 1938, before the Court and a jury of good and lawful persons of this district, to-wit:

Lloyd G. Pray

Milton B. Dreyfuss

Evelyn M. Dunn

Chester W. Glidden

C Van Wyck Mott

James W. O'Day

Joseph H. Abel

Luther P. Waring

Edward G. Lauterbach

Eugenia S. Owens

Jessie W. Johnson

James Knipe

who, after having been duly sworn to well and truly try the issues between Pansy A. Clark, plaintiff, and George M. Miller, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 18th day of November, 1938 that they find the issues aforesaid in favor of the plaintiff and that the money payable to her by the defendant by reason of the premises is the sum of (\$1,000.00) One Thousand dollars (sealed verdict)

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of (\$1,000.00) One Thousand dollars, together with costs of this action.

JOSEPH W COX

*Justice**Motion to Set Aside Verdict and for Judgment*

Filed November 23, 1938

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Nos. 88398 and 88399

Motion for directed verdict made, by defendant in both of the above entitled causes of action, at the close of all of the evidence and said motions having been not granted, now

The defendant moves the court as follows:

1 To set aside the verdict of the jury for each plaintiff in the sum of \$1,000.00 each and any judgments entered on said verdicts.

2 To have judgments entered in accordance with defendant's motion for a directed verdict for the defendant in both causes.

SAMUEL W. McCART

Attorney for Defendant

25 *Order Overruling Motion for New Trial for Plaintiff and Motion for Judgment of the Defendant*

Filed December 6, 1938

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Nos. 88398 and 88399

The above entitled cases having come on for hearing at this term of Court upon the Motion of the plaintiff, Pansy A. Clark, in case #88,398 for a new trial on the question of damages only and the Motions of the defendant, George M. Miller in cases #88,398 and #88,399 for judgment notwithstanding the verdicts and upon consideration thereof and the arguments of counsel made in open Court it is this 6th day of December, 1938;

ORDERED and ADJUDGED that all of said Motions be and the same hereby are overruled by the Court.

JOSEPH W. COX

Justice.

26

Notice of Appeal

Filed December 16, 1938

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No. 88398

Notice is hereby given this 16th day of Dec 1938, that George M Miller hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of November, 1938, in favor of plaintiff Pansy A. Clark against said George M Miller

SAMUEL W. McCART

Attorney for Defendant

BAKER & TEPPER

Order Fixing Supersedeas Bond

Filed December 16, 1938

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Nos. 88398 and 88399

ORDERED, That the amount of supersedeas bond be and the same hereby is fixed as \$1,500.00 in each case.

By the Court

JOSEPH W. COX

Justice.

Memorandum

Nos. 88398 and 88399

December 16, 1938

Supersedeas undertaking (\$1500.00) approved and filed.

Statements on Points Which Appellant Intends to Rely on Appeal

Filed January 13, 1939

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Nos. 88398 and 88399

The District Court erred:

1 In refusing to direct a verdict for the defendant at the close of plaintiffs' case, on the ground that the evidence offered by the plaintiffs established contributory negligence on the part of the plaintiff Pansy A. Clark.

2 In refusing to grant a motion, filed by defendant under Rule 50 (b), to set aside the verdict of the jury in each case, judgments entered thereon, and have judgments entered in accordance with defendant's motion for a directed verdict for the defendant in both actions, on the ground that the evidence offered by the plaintiffs established contributory negligence on the part of the plaintiff Pansy A. Clark.

SAMUEL W. McCART

Attorney for Defendant

To Charles S. Baker & Benj. L. Tepper
Attorneys for Plaintiffs
Munsey Building

You will please take notice that defendant will rely on the above Points in presenting appeal from the judgments entered in these actions.

SAMUEL W. McCART
Attorney for Defendant

Memorandum

Nos. 88398 and 88399

January 13, 1939

Narrative statement by appellant and testimony of Mrs. Pansy A. Clark (2 copies) filed.

*Order to Send Exhibits to the Court of Appeals for the
District of Columbia*

Filed January 20, 1939

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Nos. 88398 and 88399

Upon application of counsel for all parties herein, it is by the Court, this 20th day of January, 1939;

ORDERED, that the Clerk of the Court send to the Court of Appeals for the District of Columbia with the record in the above entitled causes, Plaintiffs' Exhibits #1, #2, #3 and #4 in lieu of copies thereof.

By the Court

JOSEPH W. COX
Justice.

30

Memorandum

Nos. 88398 and 88399

January 25, 1939

Time to file record on appeal extended to and including February 17, 1939.

*Order to Send Plaintiffs' Exhibit #5 to the Court of
Appeals for the District of Columbia*

Filed February 8, 1939

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Nos. 88398 and 88399

Upon application of counsel for all parties herein, it is,
by the Court, this 8th day of February, 1939;

ORDERED, that the Clerk of the Court send to the
Court of Appeals for the District of Columbia with the
record in the above entitled causes, Plaintiffs' Exhibit #5
in lieu of copies thereof.

By the Court

JOSEPH W. COX
Justice.

67

Statement of Evidence

Filed February 8, 1939

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Nos. 88398 and 88399.

By consent of counsel a plat of the scene of the accident
was admitted and marked Plaintiffs' Exhibit #1. This
plat is made a part of the evidence of this record.

Mrs. Pansy A. Clark, one of the plaintiff's, testified in
her own behalf that she is the wife of Bailey E. Clark, the
other plaintiff, that she resides at 2305 Nichols Avenue,
Southeast and has resided there since June 17, 1936, that
she has been married for thirty-eight (38) years, that her
apartment is in the second house south of the Eleventh
(11th) Precinct which is at the southwest corner of Nichols
Avenue and Chicago Street, Southeast.

Mrs. Clark then identified photographs, Plaintiffs' Ex-
hibits #2, #3 and #4 which are made a part of evidence
on appeal, showing conditions at the intersection of Nichols
Avenue and Chicago Street, that the buildings shown in the
photographs are the same as existed at the time of the ac-
cident, but that street car tracks had been taken up in
Nichols Avenue and the street surface repaved, that Chi-
cago Street makes a "T" intersection with Nichols Ave-

nue, that a gasoline station occupies the northwest corner.

68 Mrs. Clark continued that on the morning of October 27, 1936, she left her house, crossed the street to a grocery store, left there and went northward one block on the east side of Nichols Avenue to another store, then crossed Nichols Avenue to the west side. She then testified:

"A. I was walking up Nichols Avenue toward Chicago Street, and I stopped right between the fire plug and that letter box, and I stopped. I looked toward the left to see if any trucks were coming around, and then, not seeing any at the time, I looked down Chicago Street, and I did not see any. I put my foot down off the curb, ready to take a few steps."

Later she testified further:

"A. I kept across there, and that was toward Washington, from the gasoline station, and a few doors below that is Snyder's grocery store, to get some meat for my daughter, and I went in there. I crossed a few steps down to Snyder's, to get my package. Then I walked slowly on up, a little package in my hand, meat, and some change, slowly, until I did get up—I always did walk slowly—up to the curb of that gasoline station, and I stopped right there a few minutes and looked, as I say, toward the left, to see if any truck was turning from Nichols Avenue into Chicago Street, which I did not see at the time, and then I turned to see if I could see one coming up Chicago Street, and when I seen my way clear I made one step down and another step forward, when this truck come very quick and I tried to push myself, and I fell back; and, as I fell back I was unconscious, and when I woke up my limb was hanging like on a thread, and when I saw that I hollered for help, and these two colored witnesses took me there, took me in the station house, and put me on a bench, and all I can remember was hollering for my husband.

That is all I remember from that time on until I was taken to the hospital.

69 Q. To go back for a minute, when you reached that corner there by the mail box and this fire hydrant, did you see any traffic coming toward you on Chicago Street? A. No, sir, I did not.

Q. Did you notice any other traffic coming down Nichols Avenue, down the hill toward Washington? A. No, sir, I did not.

Q. When the accident happened, did you notice where this truck went that was driven by Mr. Miller? A. No, sir, I did not know, because I was knocked unconscious. I didn't remember nothing about that."

On cross examination counsel for defendant called to witnesses' attention a part of the original declaration in this manner:

"Q. You notice there, "had reached the point of and was proceeding through the crosswalk?" A. I was not going across the street at all.

Q. You were not proceeding through the crosswalk? A. I was stepping off the curb.

Q. That is what I wanted to clear up. Do you know whether an amendment was later made to this declaration, adding the third count? Do you know that? A. What was that?

Q. Do you know whether at a later date, after this was filed, an amendment was made, setting up a third count, a third cause of action? A. I don't recall that at all.

The Court. (to the witness) If you know anything about what they mean by the count.

The Witness. The only thing I knew, I was struck; I was knocked unconscious after I was struck."

The following evidence was then given:

70 "Q. What kind of pavement was here (indicating pavement on Nichols Avenue in front of the gasoline station)? A. Concrete.

Q. Do you remember what kind of condition it was in? A. Well, I noticed right there, at the moment when I was hurt, that it was a very bad curve; I remember that. I heard different ones say that any machine coming around, they had to come very slow.

Q. You heard that before this accident? A. Yes.

Q. And you knew that this was a dangerous corner? A. And that is the reason I looked, because I knew it was a dangerous place to cross the street.

Q. You were living here all the time at Nichols Avenue before the car track was pulled up and repaved? A. Yes.

Q. Did you notice, when this job was done, that this curbing was pulled out? A. That I don't know.

Q. You don't know whether that corner here (indicating the northwest corner) is the same as it was? A. I could not say positively, no, sir.

Q. As you came up there, what did you have in your arm? A. Just a small package, meat and some change.

Q. Which arm? A. In my right hand.

Q. Then you say you slowly proceeded up to this corner? A. That is right.

Q. After you got to this corner, did you then walk back again? A. No, sir, I did not. I stopped then to go home, because my home is the third door from the 11th precinct. A. When I got to the curb I was between the
71 letter box and the fire plug, right in the middle.

Q. You were right here (indicating)?

A. Not exactly on the curb, but right in there, because when I fell, they thought I was killed.

Q. How far back from the curb were you? A. Oh, I was just right on the edge of the curb, between the fire plug and the letter box, right in the middle.

Q. Is that the first time you stopped, when you got here (indicating curb at northwest corner)? A. That is the first time I stopped, when I got to that corner.

Q. When you stopped there, did you hesitate and look down for cars along the sidewalk line? A. First I looked down Nichols Avenue, and turned my head to see if any cars were turning that dangerous curve.

Q. When you did that, can you indicate on this chart how far down Nichols Avenue you looked? A. Well, I looked as far as I could see, that there was not machines coming, and then I turned to look down on Chicago Street.

Q. Will you indicate on this chart how far down you looked? A. I was standing right there (indicating curb at northwest corner), and I looked just about there (indicating).

Q. Let me move the pencil. Tell me when to stop. A. Right there (indicating a point in the pavement of Nichols Avenue about 32 feet north of the Chicago Street curb line and midway between car tracks and west curb of Nichols Avenue).

Q. You looked over your shoulder? A. Yes, sir.

Q. And nothing was present? A. Nothing was present.

Q. Then you looked down this way (indicating)?

72 A. Yes, sir.

Q. Did you look down this sidewalk at that time?

A. What? Chicago Street?

Q. Yes. A. Yes, sir, I did look down that way.

Q. Did you look down the sidewalk to see what persons were coming up? A. No, I did not. I just looked to see if there were any machines. I was looking for cars that could run over me.

Q. How long would you say you stopped on that curb?

A. Well, I stopped long enough to look, to see if there was any machine coming around the corner.

Q. Would you say that was five or ten seconds? A. Yes, sir, just a few seconds, to see if I was clear.

Q. Where were you when you first saw the truck? A. I don't remember seeing the truck, because I was hit so quick and knocked senseless and I don't remember anything until I was picked up.

Q. Was the first notice you had that there was an accident there when you hit the truck, or when the truck hit you? A. I remember putting my hands out, to try to save myself, and that truck came to me so quick, the speed of the car, and as I did, I fell back, and that is all I remember until I come to.

Q. Do you recall, when you put your hands up that way (indicating), that you put your hands on the body of the truck? A. I don't recall ever putting them on the body of the car. I remember putting my hands up.

Q. Then you went down? A. Then I went down, and that is all I knew until I came to, and I was trying to get myself up, and as I did I noticed my limb was hanging like on a thread.

Q. Do you know how your leg got broken? A.

73 The back wheel of the truck, they say, ran over my leg. I don't know, because I was knocked down.

Q. I am asking you, do you know? A. No, sir, I don't remember.

Q. Do you know? A. No, I don't know.

The Court. She says she does not.

Mr. McCart. She said she did not remember.

The Witness. No, I don't know.

Q. Did you tell Inspector Holmes x x x that this truck struck you? A. I told him that I was run over by a truck, yes, sir.

Q. Did you tell him the truck struck you? A. Yes, sir, I did."

The plaintiffs then called as a witness **Joseph Ashton**, who testified that he was standing in the gasoline station located at the northwest corner of the intersection of Nichols Avenue and Chicago Street; that he was within 20 to 25 feet of the accident and had noticed Mrs. Clark proceeding slowly along the sidewalk on the westerly side of Nichols Avenue in a southerly direction and as she approached Chicago Street she paused, looked first down Nichols Avenue and then down Chicago Street, and then proceeded southerly into the crosswalk and that at about that time he first noticed defendant Miller's truck which had just passed a car parked on Nichols Avenue adjacent to the gasoline station possibly 90 feet from the intersection in question; that the truck was traveling about 25 miles per hour as it approached the intersection; that the truck did not slow down and turned without warning into Chicago Street, striking the plaintiff, who did not see it, and knocked her to the pavement; that the truck struck her just as she stepped off; that the driver of the truck
74 brought it to a stop about 150 feet from the point of collision.

On cross examination the witness testified he was looking in a southeasterly direction at his sister-in-law who was on the opposite side of Nichols Avenue, and that when Mrs. Clark reached the Chicago Street curb the front of defendant's truck was approximately 20 feet north of the intersection; that Mrs. Clark looked north on Nichols Avenue then west on Chicago Street and that Mrs. Clark was struck by the right rear fender of the truck just as she stepped down from the curb.

On re-direct examination the witness further testified that the truck was long, orange colored trimmed in black, and in turning the corner the front of the truck passed Mrs. Clark; that the rear wheels of the truck passed nearer to the curb than the front wheels and that Mrs. Clark was struck by the rear fender of the truck.

The plaintiff then called as a witness **Guy Wicher**, who was also in the gasoline station at the northwest corner of Chicago Street and Nichols Avenue at the time of the accident. The witness testified that he observed the plaintiff walking south on the west sidewalk of Nichols Avenue toward the intersection; that he observed her as she approached the corner; that as Mrs. Clark reached the Chicago Street curb she paused and looked first north down Nichols Avenue and then west down Chicago Street, and then stepped southerly into the intersection in the crosswalk and that she took two steps into the crosswalk and the collision occurred; that when Mrs. Clark reached the curb he observed the truck of the defendant traveling on Nichols Avenue in a southerly direction at a speed of about 20 to 25 miles per hour; that without warning the truck turned into Chicago Street and the right rear fender struck Mrs. Clark.

On cross examination he testified that when Mrs. Clark reached the curb he noticed the truck about 27 feet
75 from the intersection traveling with the outside wheels of the truck in the car track and at about 20 to 25 miles per hour, and that Mrs. Clark only stopped at the curb long enough to look both ways and looked down Nichols Avenue first and then down Chicago Street, before stepping into the crosswalk, and the truck did not slow down in turning into Chicago Street.

The plaintiff then called as a witness **Herman Johnson**, who testified that he was also in the gasoline station located at the northwest corner of Nichols Avenue and Chicago Street at the time of the accident and that he saw the plaintiff Mrs. Clark walking slowly down the sidewalk of Nichols Avenue in a southerly direction and as she approached the intersection and reached the curb she paused but did not exactly stop and looked down Nichols Avenue and down Chicago Street and then took two or three steps slowly into the intersection and within the crosswalk when she was struck by the truck of the defendant Miller, which he had observed traveling along Nichols Avenue in a southerly direction and at a rate of speed of from 25 to 27 miles per hour; that the truck approached the intersection of Nichols Avenue and Chicago Street, and without slowing down turned without sounding a horn into Chicago

Street and that Mrs. Clark was struck by the rear part of the truck when she had taken two or three steps.

On cross examination the witness testified that Mrs. Clark before stepping into the crosswalk did not hesitate but looked both ways and that at the time she reached the curb the truck was about 40 feet north from the intersection; witness was talking with his wife who was on the east sidewalk of Nichols Avenue opposite the precinct house.

On re-direct examination he testified that Mrs. Clark was struck by the right rear fender of the truck and that the wheel of the truck passed over her foot.

Drs. Chas. W. Harnsberger, William J. B. Orr
76 and **Custic Lee Hall** then described the extent of the plaintiff's injuries and the permanent disability which had resulted to the plaintiff Pansy A. Clark by reason of the injuries sustained in the accident. Dr. Orr testified that the broken bone could have been caused by a sharp blow.

Bailey E. Clark then testified to the expenditures made necessary by this accident.

Plaintiffs then offered in evidence certain paragraphs of the Traffic and Motor Vehicle Regulations of the District of Columbia, Plaintiffs' Exhibit #5, which is made a part of the record on appeal.

The plaintiffs then rested.

The defendant then moved the Court for a directed verdict for the defendant in both cases, on the ground that the evidence offered by the plaintiffs established contributory negligence on the part of plaintiff Pansy A. Clark. This motion was denied by the Court and exception noted.

The defendant **George M. Miller** thereupon took the stand and testified as follows: that he was the owner of a General Motors Corporation truck, one month old, with a refrigerator body, and on this particular occasion it was loaded with meat; that the truck and load weighted about 8,000 pounds; that the truck was approximately fourteen (14) feet in length and overhung the rear wheels approximately two (2) feet; that it had dual rear wheels allowing an inch and a quarter space between the pneumatic tires.

In describing the events proceeding the accident, the witness testified as follows:

Q. Now, after you passed that curve and you came along in front of the gas station, can you tell us how fast you were traveling? A. I was not doing over 15 to 18 miles per hour.

77 Q. Can you tell us in what part of the street you were traveling? A. My left wheels were in the middle of the car track.

Q. Did there come a time as you were going south on Nichols Avenue when you saw the plaintiff, Mrs. Clark? A. Yes.

Q. Will you tell the jury where your truck was when you first saw Mrs. Clark? A. I was about 50 feet down Nichols Avenue, and Mrs. Clark was standing on the corner about 2 feet from the curb.

Q. Could you indicate with this pencil where she was, and where you were, at that time? A. Mrs. Clark was about here (indicating), and I was down in here (indicating), and there was a parked car here (indicating).

Q. Now, you placed your truck right at the edge of the sidewalk. A. I meant I was over here (indicating), in the car tracks.

Q. At the time you first saw Mrs. Clark, there, what was she doing? A. She was standing still, looking back.

Q. Looking where? A. Looking down Chicago Street.

Q. As you approached that corner, did you observe Mrs. Clark again? A. I seen Mrs. Clark the whole time I came up there.

Q. Did you make any signal that you were going to make a turn? A. Not a right-hand turn. I put a signal out to slow down.

Q. What signal did you put out? A. Straight out.

Q. Were you alone in this truck? A. I was.

78 Q. As you approached Mrs. Clark to make that turn, did you notice any cars coming out of Chicago Street. A. No cars was coming out of Chicago Street.

Q. Did you notice any cars going north on Nichols Avenue, intending to turn into Chicago Street? A. No cars.

Q. Did you continue to observe Mrs. Clark? A. I did, as long as she was standing there and I was approaching the intersection.

Q. Did there come a time when you swung your truck from Nichols Avenue into Chicago Street? A. There was.

Q. Can you indicate where you were when you approximately started to make that turn? A. I came here in the middle of the track (indicating on blackboard) and across this way (indicating) more in that shape (indicating).

Q. In the course of that travel, did there come a time when Mrs. Clark passed out of your line of vision? A. Yes.

Q. Mr. Miller, from the time you started to make that right turn, will you tell us what happened in regard to your truck and Mrs. Clark, so far as you know? A. As far as I know, I made the turn and came to here (indicating), and crossed in. At that point, as I got opposite this police station, the policeman was standing on this porch and he threwed his hand up and hollered "Woman." My attention was attracted and I stopped the truck there, and I stopped approximately down here (indicating). The back of my truck was opposite this station, and I was in the middle of the street. I looked back and seen this woman lying in the street on the curb here (indicating), and I ran
79 back and it was Mrs. Clark.

Q. While you were making that turn, did you notice Mrs. Clark make any movement? A. Mrs. Clark did not make no move until the time I passed her."

Upon cross examination defendant Miller testified as follows:

"Q. You were going, you say, between 15 and 18 miles an hour? A. Yes, sir.

Q. When you made that turn there at the corner, you were going at 15 to 18 miles an hour? A. No, sir, I take it back; about 6 to 8. Nobody can turn that fast at Chicago Street.

Q. So you slowed down at that point? A. I certainly did.

Q. And, slowing down to 6 or 8 miles—where did you slow down to that speed? A. I started braking about 25 feet from the curb."

The defendant then called as a witness a policeman named **Ralph E. Davis**, who testified that he was in the most westerly window of the police station facing Chicago Street and saw the truck of the defendant approaching the intersection at a speed of between 15 and 18 miles per hour; that the outer wheels were in the car tracks; that at the time Mrs. Clark was standing at the curb at the north-

west corner of Nichols Avenue and Chicago Street; that the truck made the turn and cut off Mrs. Clark from his view and the next time he saw her she was 'setting' on the curb.

The plaintiff then called as a witness **Police Inspector Holmes** who testified that he, several months after the accident, had talked with Mrs. Clark and that she told him that she had been run down by a truck operated by the defendant Miller while she was crossing the intersection formed by Chicago Street and Nichols Avenue and
80 that as she started to cross the street she did not see an automobile or hear one and the next thing she knew she was struck by an automobile or truck.

The defendant then rested.

Some rebuttal testimony by Ashton, Wicher, Johnson and Mrs. Clark was then submitted in corroboration of the version of the accident as testified to by them in plaintiffs' case in chief, and testimony was concluded.

Whereupon counsel for the defendant again moved for a directed verdict in behalf of the defendant in both actions on the ground that the evidence disclosed contributory negligence on the part of plaintiff Pansy A. Clark. Decision on this motion was reserved by the Court with instruction to counsel for defendant to file a motion under Rule 50 of the Rules of Procedure.

At a later date motion under rule 50 for judgment for defendant was filed in both cases, argued and overruled.

Agreed:

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Attorneys for Plaintiffs

CHAS S. BAKER

BENJ. L. TEPPER

WARREN E. MAGEE

Attorneys for Defendant

SAMUEL W. McCART

81 *Designation of Record by Agreement*

Filed February 8, 1939

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Nos. 88398 and 88399

1. Amended Declarations
2. Answers to Amended Declarations
3. Memo of Entry of Judgments
4. Defendant's Motion for Judgment Under Rule 50
5. Order over-ruling Motion for Judgment
6. Points on which appellant (defendant) intends to rely
7. Reporter's transcript of Pansy A. Clark's testimony
8. Condensed statement of testimony of all other witnesses
9. Plaintiffs' Exhibits #1, #2, #3, #4 and #5
10. Order sending up Plaintiffs' Exhibits #1 to #4
11. Order sending up Plaintiffs' Exhibit #5
12. This designation

Agreed

CHAS. S. BAKER

BENJ. L. TEPPER

WARREN E. MAGEE

Attorneys for Plaintiffs

SAMUEL W. McCART

*Attorney for Defendant*82 District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 81, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 88398 at Law, wherein Pansy A. Clark is Plaintiff and George M. Miller is Defendant, and in cause No. 88399 at Law, wherein Bailey E.

Clark is Plaintiff and George M. Miller is Defendant, as the same remain upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 16th day of February, 1939.

CHARLES E. STEWART,

(Seal)

Clerk,

By CHAS. B. COFLIN,

Assistant Clerk.

83 In the United States Court of Appeals for the
District of Columbia

Original #7344-45

PANSY A. CLARK *Plaintiff*

VS

GEORGE M. MILLER *Defendant*

BAILEY E. CLARK *Plaintiff*

VS

GEORGE M. MILLER *Defendant*

Stipulation as to Record

Counsel for the parties herein stipulate that the stenographers report of testimony of Pansy A. Clark and Plaintiffs Exhibits #1, #2, 3, 4 and #5 be omitted from the record when printed.

WARREN E. MAGEE

Attorney for Respondent

SAMUEL W. McCART

Attorney for Appellant

Endorsed on Cover: No. 7344. George M. Miller, Appellant, vs. Pansy A. Clark. No. 7345. George M. Miller, Appellant, vs. Bailey E. Clark. United States Court of Appeals for the District of Columbia Filed Feb 17 1939 Joseph W. Stewart, Clerk.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1939

No. 7344

GEORGE M. MILLER, *Appellant*

vs.

PANSY A. CLARK

and

No. 7345

GEORGE M. MILLER, *Appellant*

vs.

BAILEY E. CLARK

BRIEF FOR APPELLANT

SAMUEL W. McCART.

Attorney for Appellant.

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vs.

BAILEY E. CLARK

BRIEF ON BEHALF OF APPELLANT

INTRODUCTION

These are actions in tort brought by appellee Mrs. Pansy A. Clark to recover for personal injuries alleged to have been received by her October 27, 1936, through

the negligence of appellant and by appellee Bailey E. Clark, her husband, to recover for expenditures made necessary by these injuries.

STATEMENT OF FACTS

The appellee Mrs. Clark on October 27, 1936, was walking southerly on Nichols Avenue, Southeast, toward the intersection with Chicago Street and as she stepped or just after she stepped from the curb of Chicago Street into the crosswalk she came in contact with the right rear fender of a truck operated by appellant, and then making a right turn from southerly on Nichols Avenue to westerly on Chicago Street.

The declaration in each action is in three counts, the first alleging that Mrs. Clark was in the act of descending from the curb into the crosswalk, the second alleging that Mrs. Clark was proceeding through the crosswalk, the third alleging the rule of last clear chance, and all counts alleging negligence in the operation of appellant's truck.

The record shows that Chicago Street, Southeast, makes a "T" intersection with Nichols Avenue (R. 24); that Nichols Avenue at this point is 40 feet wide and Chicago Street 30 feet wide (Plaintiffs' Exhibit #1); that both streets are paved and curbed and that in October, 1936, there were double street car tracks in Nichols Avenue, since removed. A gasoline station occupies the northwest corner and the 11th precinct police station occupies the southwest corner.

The account presented by appellee Pansy A. Clark of events immediately prior to the accident is that she left her home, two doors south of the precinct, crossed Nichols Avenue to a store, left there and went north on the east sidewalk of Nichols Avenue one block to

another store, then recrossed Nichols Avenue there to the west side.

She then walked slowly south on the west sidewalk of Nichols Avenue (R. 25) to the north curb of Chicago Street, intending to cross Chicago Street in a southerly direction. The sidewalk at this point is seven feet four inches wide. (Exhibit #1)

On direct examination Mrs. Clark testified that she stopped at this curb "a few minutes" (R. 25) and looked down, or northerly, on Nichols Avenue for vehicles and then down, or westerly, on Chicago Street. On cross-examination this time was stated as a few seconds. (R. 28) She saw no approaching vehicles, so she made "one step down" into the westerly crosswalk of Nichols Avenue "and another step forward when this truck come very quick and I tried to push myself and fell back." (R. 25)

On cross-examination Mrs. Clark repudiated the claim in the Second Count of her declaration, that she was crossing the crosswalk, and confirmed the First Count of her declaration by stating that "I was stepping off the curb," (R. 26) meaning at the time the accident occurred.

Mrs. Clark also testified that at the time of this accident she knew that this intersection was dangerous. She stated, "And that is the reason I looked, because I knew it was a dangerous place to cross the street." (R. 26) She looked down Nichols Avenue particularly for any "machine" turning right into Chicago Street. (R. 28)

Mrs. Clark pointed out on the diagram or plat (Plaintiffs' Exhibit #1) where she looked on Nichols Avenue, indicating a spot in the pavement of Nichols Avenue about 32 feet north of the Chicago Street

Curb line and midway between the car tracks and the west curb. (R. 27)

Three witnesses, Joseph Ashton, Guy Wicher and Herman Johnson, all young colored men, called by the appellees, testified that they saw this accident from where they were standing at the gasoline station at the Northwest corner. They all testified that Mrs. Clark walked slowly south to the Chicago Street curb and that appellant's truck went south on Nichols Avenue at a speed of 25 miles per hour, as stated by one witness, (R. 29) 20 to 25 miles per hour, as stated by another, (R. 30) and 25 to 27 miles per hour, as stated by the third witness, (R. 30) and that without slowing down or sounding a warning, it turned west into Chicago Street.

The truck was painted orange color with black trimmings. (R. 29)

These three witnesses testified that when Mrs. Clark reached the Chicago Street curb the truck was traveling with its outside wheels in the car tracks and at that time one witness testified that the truck was about 20 feet north of Chicago Street, (R. 29) another stated the distance as about 27 feet, (R. 30) and the third stated the distance as about 40 feet. (R. 30) They all agreed that Mrs. Clark looked down (north on) Nichols Avenue and down (west on) Chicago Street before stepping from the curb. (R. 29 and 30)

Appellees offered no precise evidence of the location of the truck when Mrs. Clark actually stepped down into the crosswalk, but its position at that time might be deduced from the time Mrs. Clark paused at the curb. She stated this time as a few minutes (R. 25) or a few seconds (R. 28). Ashton testified that she paused and looked both ways. (R. 29) Wicher testified that Mrs. Clark paused and stopped long enough

to look both ways. (R. 30) Johnson testified that she "paused but did not exactly stop." (R. 30)

As to the distance which Mrs. Clark travelled from the curb before coming in contact with the truck: she stated this as one step down and another step forward (R. 25) and as "I was stepping off the curb" (R. 26); witness Ashton as 'just as she stepped off' and 'just as she stepped down from the curb' (R. 29); witness Wicher as after "she took two steps into the cross-walk" (R. 30) and witness Johnson as "two or three steps." (R. 30)

No evidence was offered by the appellees as to Mrs. Clark's position when the front of the truck, about 14 feet long, passed her, but from the fact that she contacted the right rear fender (R. 29 and 30) the evidence indicated that the front of the truck must have been in front of her or almost in front of her when she stepped from the curb. That such was a fact, was testified to by appellant (R. 33) and his witness Davis. (R. 34)

Appellant testified that he was operating a truck one month old; that, as it was loaded, it weighed about 8000 pounds; that it had dual rear wheels; that as he approached this intersection he was traveling 15 to 18 miles per hour; (R. 32) that when he was about 50 feet from Chicago Street he saw Mrs. Clark standing at the curb looking down (west on) Chicago Street (R. 32) and about 2 feet from the curb; that she stood there while he approached; that he slowed down to 6 to 8 miles per hour (R. 33) in making the turn, and that she was still standing there on the curb when his truck passed her. (R. 33)

Police Officer Davis testified that he was in a window of the precinct house; saw appellant's truck approaching south on Nichols Avenue at 15 to 18 miles per

hour (R. 33); saw Mrs. Clark standing at the curb; that the truck made the turn and cut her from his view while she was still on the curb and he next saw her "setting" on the curb (R. 34) after the truck passed his line of vision.

Police Inspector Holmes then testified that Mrs. Clark told him that as she started to cross the street she did not see or hear any automobile and the next thing she knew she was struck. (R. 34)

Restated concisely, the pertinent testimony, most favorable to Mrs. Clark, showed that Mrs. Clark came to a "T" intersection which she knew to be dangerous; that she expected some vehicle to turn the corner from her left rear and so was careful to look for such a vehicle; that she looked to a point approximately where her witnesses said the appellant's truck was; that she did not see it; that the truck made the turn and she stepped off the curb; and immediately thereafter she put her hands up, pushed on the truck at the right rear fender and fell backwards.

STATEMENT OF POINTS ON WHICH APPELLANT RELIES

The appellant assigns errors by the trial Court:

1. In refusing to direct a verdict for the defendant at the close of plaintiffs' case, on the ground that the evidence offered by the plaintiffs established negligence on the part of plaintiff Pansy A. Clark.
2. In refusing to grant a motion, filed by defendant, under Rule 50(b), to set aside the verdict of the jury in each case, judgments entered thereon, and have judgments entered in accordance with defendant's motion for a directed verdict for the defendant in both actions, on the ground that the evidence offered by the

plaintiffs established negligence on the part of plaintiff Pansy A. Clark.

SUMMARY OF ARGUMENT

The appellant argues two propositions in support of his contention that the trial Court erred as specified in the "Statement of Points on Which Appellant Relies:"

1. That a person who reaches a street intersection known to her to be dangerous due to vehicles making right turns toward the crosswalk and who, with that danger in mind, deliberately looks for a vehicle making the turn and fails to see such a vehicle, within the danger zone, making such turn and who then steps off the curb, becomes conscious, immediately on or after stepping off, of the presence of a vehicle directly in front of her and who pushes on said vehicle at the right rear fender and falls, is negligent as a matter of law.

2. That the rule of last clear chance cannot apply in these cases as Mrs. Clark contacted the right rear fender of appellant's truck and was herself negligent until the time she pushed on the truck and fell.

ARGUMENT

These cases differ from reported cases of pedestrians walking into the side of vehicles at street intersections in that the intersection here is a "T" intersection (R. 24) and in that Mrs. Clark was conscious that this intersection was dangerous to pedestrians from vehicles making right turns into Chicago Street (R. 26 and 30) and for that reason looked particularly for any "machine" coming around this corner. (R. 26 and 28) The truck, at the time she looked, was, accord-

ing to her witnesses, closer to her than the point where she looked, and hence it was within her range of vision, if in fact she did look. In spite of the conspicuous orange color of the truck, she did not see it, nor did she become conscious of the presence of the truck until its rear fender was in front of her.

How long she stopped at the curb is an issue of fact. Whether it was a few minutes, as she originally stated (R. 25) and as corroborated (R. 33) or whether a few seconds as she later testified (R. 28), or whether just a pause as stated by her witnesses (R. 29 and 30), is immaterial and as she is emphatic that she stopped long enough to make certain no truck was making this turn, for she said she looked "to see if any truck was turning from Nichols Avenue into Chicago Street" (R. 25); "turned my head to see if any cars were turning that dangerous curve" (R. 27); "I was looking for cars that could run over me" (R. 28); and, "I stopped long enough to see if there were any machines coming around the corner." (R. 28)

The plaintiffs below did not offer any specific evidence of the location of the truck at the time Mrs. Clark stepped from the curb, but evidence was offered as to the location of the truck when Mrs. Clark reached the curb. Each moment of hesitation by her brought the truck nearer to her. Evidence of the duration of the hesitation varies from a few minutes (R. 25) to hardly at all (R. 29 and 30) and from this evidence the location of the truck at the time she stepped from the curb might be deduced. But any deduction made places the truck, at the time Mrs. Clark stepped from the curb, as nearer to her than the spot to which she claimed to have looked. The defendant below stated that Mrs. Clark stood at the curb while he approached and made the turn. (R. 33)

The plaintiffs below did not offer any specific evidence as to the speed of the truck at the time of the collision. They did offer evidence that the speed of the truck when on Nichols Avenue was 20 to 27 miles per hour and that it turned without slowing down (R. 29 and 30). Whether the truck slowed down while completing the turn is not testified to. Defendant fixed his speed on Nichols Avenue at 15 to 18 miles per hour (R. 32) and stated that in making the turn his speed was 6 to 8 miles per hour (R. 33). This court will take judicial notice of the fact that a truck with a load, having a combined weight of 8000 pounds (R. 31) could not negotiate the sharp turn necessitated at this intersection at 20 to 27 miles per hour without toppling over and will take judicial notice that a truck so weighted would have to turn at a slow rate of speed, and will take judicial notice that testimony that this truck turned this corner without slowing from 20 to 27 miles per hour is necessarily false.

Plaintiffs below offered contradictory testimony as to how far Mrs. Clark had proceeded into the intersection before she contacted the truck at the right rear fender. This distance is variously stated: by Mrs. Clark as when "I was stepping off the curb" (R. 26) and as two steps (R. 25); by Ashton as "just as she stepped off" the curb and "just as she stepped down from the curb" (R. 29); by Wicher as two steps (R. 30); and by Johnson as two or three steps. (R. 31)

That she was very near to the curb at the time she pushed on the truck is definitely established by the fact that when she pushed herself and went down she sat on the curb. (R. 33 and 34)

It is noteworthy that Mrs. Clark did not testify that she was struck by the truck; nor is there other evidence in this case to establish that she was struck by

the truck. Her account is that she put up her hands and pushed. (R. 25 and 28) Presumably, she pushed on the truck at the right rear fender. She stood between the truck and her three witnesses so that they were not in a position to contradict her statement.

Nor is there in the record any satisfactory evidence that the truck ran over her leg or foot, for had one or both of the dual wheels run over her leg or foot the leg or foot would have been crushed instead of fractured. The physical necessities of the situation contradict the testimony of Johnson (R. 31) that a wheel ran over her foot.

Giving every proper benefit of the evidence to the plaintiffs below, all fair minded men would be obliged to find from the evidence and from the incontrovertible physical facts that when Mrs. Clark stepped from the curb the front of the truck was in front of her or almost upon her and so near to her that she could not have failed to see it had she looked. Yet she did not see it, for, as she testified, "I don't remember seeing the truck." (R. 28)

The facts in this case afford apt application of the words of this Court in *Jackson v. Capital Transit Co.*, 99 F. (2d) 380, 69 App. D. C. 147, 150:

"It is a matter of common knowledge that pedestrians take all manner of liberties with traffic regulations and that traffic is timed upon the assumption that they will stop or continue ahead and get clear of the oncoming automobile or street car. In fact—as has been frequently said in the cases—street car traffic could not be maintained in crowded cities on any other assumption." Nor can automobile traffic.

APPELLEE, MRS. CLARK, WAS NEGLIGENT AS A MATTER OF LAW

Appellant claims that the testimony in this case discloses negligence as a matter of law on the part of Mrs. Clark in failing to see appellant's truck in time to avoid coming in contact with it and argues that the case of *Harten v. Brightwood Railway Co.*, 18 App. D. C. 260, offers a precedent of issues involved in this case.

In the *Harten* case the Court says, "She was familiar with the place and knew that a car might be expected upon the other track at any moment." So here, Mrs. Clark knew and expected that a vehicle would turn this corner at any moment. In that case the presence of the tracks was constructive notice of danger. Here Mrs. Clark had actual knowledge of danger from trucks rounding this corner.

In the *Harten* case, the plaintiff testified, "I looked and did not see a car coming." Likewise, Mrs. Clark looked and did not see, and this in spite of the conspicuous orange color of the truck. In the *Harten* case this court said:

"It is unnecessary to consider whether the defendant, operating the car which did the injury, was guilty of negligence that would warrant the submissions of the question to the jury, for we are of the opinion that the plaintiff was plainly guilty of contributory negligence. The accident could not have occurred had she exercised any degree of care before crossing the tracks."

The *Harten* case recites from *Northern Pacific Railway Co. v. Fruman*, 174 U. S. 379:

"Judging from the common experience of men, there can be but one plausible solution of the prob-

lem of how the collision occurred. He did not look or if he looked he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence."

The Court of Appeals then goes on to observe in the Harten case:

"The foregoing reasoning applies with even greater force to the facts of this case."

Seavers v. Lisner, 41 App. D. C. 183, is authority for the proposition that one who exposes himself to a known danger and is injured thereby cannot recover. See also *Staples v. Casey*, 43 App. D. C. 477.

Although the intersections involved are not "T" intersections, several cases involving pedestrians coming in collisions with vehicles at crosswalks are cited as being in point.

They are in point because the duty to look is the duty to look to that place from which automobiles are expected to come and Mrs. Clark testified that she expected a machine to turn just as appellant's truck did turn. It is also to be noted that at "X" intersections a pedestrian may expect danger from four directions whereas in this case danger could come from only three directions.

In *Steele v. Hamilton*, 218 Mich. 522, 188 N. W. 345, when plaintiff reached the south curb at crosswalk, she said that she looked for approaching vehicles and saw none but saw that the semaphore was turned for her to proceed. When 20 feet from the south curb she contacted the side of an automobile. A witness testified that the point of contact was where the front fender meets the running board. The Court said in this opinion:

"It is exceedingly difficult to read the record evidence of this accident and avoid the conclusion that plaintiff was unmindful of her surroundings and ran into the auto. It is obvious that the car occupied that part of the street immediately in front of her before she did, and, had she been making the use of her eyes that most people do when traveling in a busy section of this city, she would have seen the car in season to have stopped before it struck her."

"We are of the opinion that the evidence as it appears in the record, was such that the trial court should have directed a verdict for the defendant on the ground that plaintiff herself was guilty of negligence as a matter of law."

In *Dando v. Brobst*, 318 Pa. 325, 177 A 831, plaintiff waited at the curb for traffic signal to change. She started on green light, took step down with right foot then advanced left and front wheel of car ran over the instep of her left foot. She testified she looked both ways before starting to cross and saw no car approaching. She also looked to see if any car was coming around the corner. The opinion reads, page 832:

"It is unnecessary to consider whether the evidence was sufficient to sustain the finding of negligence in the operation of the car, since we are of the opinion that plaintiff was contributorily negligent as a matter of law."

And at page 833, "It need hardly be pointed out that a situation in which the danger arises after the pedestrian has committed himself to the crossing is not parallel to one in which it exists before the crossing is begun."

Burr v. Munson, 209 Ala. 362, 96 So. 235, was a death case. Decedent moved from the curb and con-

tacted the side of the front fender of an automobile. Defendant did not see the person struck until after the collision. The opinion says in part:

“On the evidence in this record the conclusion is inescapable that the sole cause of the injury was that the woman, herself, moved into contact with the car.”

The case at bar is very similar to the case of *Guilbory v. United Gas Public Service Co.*, 177 La. 329, 148 So. 274. In that case the defendant's driver observed a girl standing on the curbing at a crosswalk looking south (away from him); his speed was 15 miles per hour; he saw her 15 to 20 feet ahead. He was going south. When 4 or 5 feet from her he saw her standing, making no movement indicating any intention on her part to enter into or cross the street: he took his eyes off her and almost immediately afterwards heard the blow, which resulted from her impact with the rear of the right side of his automobile. The Court, in considering the facts, says, page 279:

“Under the evidence, it has not been made to appear that Jones was negligent and at fault. It does appear that plaintiff's daughter was at fault for entering into the street in the very face of an oncoming automobile and without looking forward or to either side, walking into it as it was passing. And the evidence fails to show that the defendant could have avoided the accident; it appears, instead, that it was on his part unavoidable.”

The presence of a traffic regulation giving a pedestrian the right-of-way does not relieve the pedestrian from the common law duty to look before entering the crosswalk.

- Horowitz v. Eurove, 129 Ohio St. 8, 193 N. E. 644
 Cherubino v. Meenan, 253 N. Y. 462, 171 N. E.
 708
 Murray v. Jacobson, 195 Minn. 153, 262 N. W. 152
 Bland v. Hershey, 50 F. (2d) 991, 60 App. D. C.
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This Court has said that it is the duty of a pedestrian, in crossing a street, to keep a lookout to avoid being struck.

- Schweinhaut v. Flaherty, 60 App. D. C. 151,
 49 F (2d) 533
 Walsh v. Rosenberg, 65 App. D. C. 157, 81 F.
 (2d) 559

From these decisions it may be inferred that in the District of Columbia a pedestrian has a duty to look before stepping down from a curb into the street and that failure to look or to see is negligence as a matter of law.

Assuming that the evidence that appellant's truck was traveling on Nichols Avenue 20 to 27 miles per hour as against a speed limit of 22 miles per hour is credible, possible excess speed up to 5 miles per hour offers no excuse to Mrs. Clark for not seeing the truck as she looked to where it was, yet did not see it. Had she observed the truck she would have observed its speed and protected herself accordingly. Her failure to see under such circumstances constitutes negligence as a matter of law.

- Milby v. Diggs, 118 W. Va. 56, 189 S. E. 107
 Frazier v. Stout, 165 Va. 68, 181 S. E. 377
 Stephen Putney Shoe Co., Inc. v. Ormsby, 120
 Va. 297, 105 S. E. 563

The duty of a pedestrian is well set forth in *Yoder v. Charleston Transit Co.*, 119 W. Va. 61, 192 S. E. 349, wherein the Court says, page 352:

“Under the circumstances in evidence, it does not suffice for the plaintiff to say that she did not see the bus, or that it came into view and bore down on her with overwhelming speed after she started across the street. It is the duty of pedestrians to use their sense of sight, not casually, but carefully. And, in attempting to cross streets, pedestrians may not deliberately enter into danger which proper use of their sight would disclose to them as impending. ‘To meet the requirements of the law as to looking, one must look for the purpose of finding out, and the circumstances may be such that courts will not listen to the plea of a pedestrian, that, although he looked, he did not see what was immediately in front of him or in plain view, or what he could have seen by a reasonable use of his senses in time to avoid injury.’ ”

In 2 *Blashfield's Cyclopedia of Automobile Law*, Section 13, is this statement:

“The testimony of a witness that he looked and did not see an object which he must have seen if he had looked is unworthy of consideration, citing *Sullivan v. Smith*, 123 Md. 546, 91 A 456.”

The duty of a pedestrian was considered in *Dando v. Brobst*, ante, page 832:

“In any case, however, plaintiff was under a duty to look before stepping into the street, and since the ‘incontrovertible physical facts’ show that the car was almost upon her when she stepped from the curb and that she would certainly have seen it if she had looked, it is plain that she

must have failed to look. Her own negligence therefore bars her recovery."

In addition to the cases cited above, these cases hold that failure on the part of a pedestrian in crossing at a crosswalk to look and to see is negligence as a matter of law:

- Milby v. Diggs, 118 W. Va. 56, 189 S. E. 107
- Frazier v. Stout, 165 Va. 68, 181 S. E. 377
- Stephen Putney Shoe Co., Inc. v. Ormsby, 120 Va. 297, 105 S. E. 563
- Robichaux v. Dorion, 17 La. App. 159, 134 So. 784
- Halzle v. Hargreaves, 233 Mich. 234, 206 N. W. 356
- Atkins v. Bouchet, 65 Cal. App. 94, 223 P 87
- Martin Baking Co. v. Tompkinson, 27 Oh. App. 355

THE RULE OF LAST CLEAR CHANCE CANNOT APPLY

In order for the rule of last clear chance to apply, as stated in *Correnti v. Catino*, 115 Conn. 213, 160 A 892, 893, a case involving a pedestrian struck at a crosswalk, it is required:

"1—That the injured party has already come into a position of peril; 2—that the injuring party then or thereafter becomes, or in the exercise of ordinary prudence ought to have become, aware not only of the fact, but also that the party in peril either reasonably cannot escape from it, or apparently will not avail himself of opportunities open to him for doing so; 3—that the injuring party subsequently has the opportunity by the exercise of reasonable care to save the other from harm; and 4—that he fails to exercise such care."

Not one of these four elements is present in the case at bar. The appellee, Mrs. Clark, was not in a

position of peril but herself created any peril which came to exist. As was said in *Correnti v. Catino*, supra at page 895:

“Where, however, the injured person, before entering the zone of danger, although apparently about to enter it, continues on toward it, each advance that he makes is a new act of negligence on his part, and, if injury results through his own negligence and that of another, there can be no recovery, for each must be regarded as proximate contributor to the injury resulting from their concurrent negligence.”

Again at page 896, “Where both the pedestrian and the driver of the automobile proceed in their course to the moment of collision, and the former does not come into the position of peril from the automobile until substantially the instant he is hit, the doctrine can have no place in this case.”

Goudreau v. Duelette, 133 Me. 365, 178 A 355, was a case where a pedestrian was struck at a crosswalk. She had failed to look for vehicles. Of the last clear chance rule, the court said, page 356:

“The ‘last clear chance’ rule does not apply because her negligence progressively and actively continued up to the point of collision.”

Gremillion vs. Couvillion, 5 La. App. 441, was a case in which a boy walked into the side of a passing automobile. Of the last clear chance rule, the opinion states at page 442:

“The fact of the boy having come in contact with the side of the car, we think, precludes any discussion of the last clear chance, as it appears that if the defendant was in any manner negligent, the boy who was past 14 years of age, was like-

wise negligent, and the negligence of the latter continued until the moment of the collision.”

Concurring negligence continuing to the moment of impact precludes application of the last clear chance rule. *Frazier v. Stout*, 165 Va. 68, 181 S. E. 377.

CONCLUSION

The appellant respectfully submits that the judgments of the Court below should be here reversed and the causes remanded with instructions for entry of judgment for appellant in both cases.

SAMUEL W. McCART,
Attorney for Appellant.

IN THE
United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1939.

No. 7344.

GEORGE M. MILLER, *Appellant,*

vs.

PANSY A. CLARK
and

No. 7345.

GEORGE M. MILLER, *Appellant,*

vs.

BAILEY E. CLARK.

BRIEF FOR APPELLEES.

CHAS. S. BAKER,
BENJ. L. TEPPER,
WARREN E. MAGEE,
Attorneys for Appellees.

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BRIEF ON BEHALF OF APPELLEES.

Statement of Facts.

Appellee, Mrs. Pansy A. Clark, a pedestrian, was returning home. When she reached the intersection of Chicago Street and Nichols Avenue, she "paused,"

“hesitated” or “stopped” and *first*, looked “over her shoulder” *behind her*, down Nichols Avenue and *secondly* to her right down Chicago Street. (R. 25, 27, 28, 29, 30.)

Seeing no traffic either *turning into* Chicago Street from Nichols Avenue or *on* Chicago Street (R. 25, 26, 27, 28, 29, 34) Mrs. Clark entered the cross walk.

At the time Mrs. Clark entered the cross walk, appellant’s truck was being operated in a southerly direction *some distance behind her* on Nichols Avenue.

The witness, Ashton, testified at or about the time Mrs. Clark “proceeded into the cross walk” appellant’s truck was “possibly ninety feet from the intersection.” (R. 29.) Other witnesses place the truck at varying distances *behind Mrs. Clark* as she reached or stepped into the cross walk. Wicher “about twenty-seven feet.” (R. 30.) Johnson “about forty feet.” (R. 31.) Appellant admitted when he first saw Mrs. Clark “about two feet from the curb” * * * “I was about fifty feet down Nichols Avenue.” (R. 32.)

Appellees proved (Ex. #5) a D. C. Traffic Regulation fixing the maximum speed on Nichols Avenue at twenty-two miles per hour. Nichols Avenue is a main thoroughfare with car tracks, while Chicago Street is a small side street terminating at its intersection with Nichols Avenue (Ex. #1), no traffic device was in operation and no officer controlled the intersection at the time.

All witnesses, except appellant, testified appellant changed the course of his truck on Nichols Avenue, without warning, without slowing down and ran down Mrs. Clark who was slowly walking through the Chicago Street cross walk. (R. 25, 29, 30, 31, 34.) She was looking in another direction and did not see appellant's truck approaching from behind.

Appellant's speed *in making the turn* without warning into Chicago Street with a General Motors truck (over fourteen feet in length and weighing eight thousand pounds) was said to be "very quick" (R. 25), "twenty-five miles per hour" (R. 29), "about twenty to twenty-five miles per hour" (R. 30), "from twenty-five to twenty-seven miles per hour" (R. 30) and "between fifteen and eighteen miles per hour." (R. 33.)

Appellant asks this Court to *judicially notice* that this evidence "is necessarily false," yet made no effort to prove this at the trial.

Appellant's truck "struck" Mrs. Clark and the left rear wheel "passed over her foot." (R. 31.) The "sharp blow" knocked Mrs. Clark down, rendered her unconscious, broke both bones in her left leg and forced the broken bones through the flesh so that her "limb was hanging like a thread." (R. 28.) Permanent disability resulted. (R. 31.)

While the front of the truck passed around Mrs. Clark the rear fender struck and felled her. This was explained by the fact that "rear wheels of the truck

passed nearer the curb than the front wheels" because the truck was "turning the corner." (R. 29.)

Appellant on running down Mrs. Clark heard Officer Davis "holler woman" (R. 33), yet was unable to bring his truck to a stop until it travelled "about one hundred fifty feet from the point of collision." (R. 29.)

Points on Which Appellant Relies.

While appellant assigns two errors, they rest upon the single ground (R. 22) that appellee's "evidence established contributory negligence."

In support of his assignments appellant attempts to argue two "propositions."

1. That Mrs. Clark was guilty of contributory negligence as a matter of law.

2. That the doctrine of the last clear chance cannot apply.

Appellees contend appellant is in no position to argue either proposition.

On the merits appellees contend Mrs. Clark was not contributorily negligent.

In any event the cases below were submitted to a jury on the doctrine of the last clear chance and the jury's verdicts are conclusive.

ARGUMENT.

Errors Not Assigned Are Not Available on Appeal.

It is settled law that errors not assigned are not available on appeal.

Cooper v. Sellers, 30 App. D. C. 567.

Helvering v. Helmholtz, 64 App. D. C. 114, affirmed 296 U. S. 93.

The Rules of Civil Procedure recognize this doctrine. Rule 75(d) provides "If the appellant does not designate * * * the complete record and all proceedings and evidence, he shall serve * * * a concise statement of the points on which he intends to rely * * *."

Only a portion of the record, proceedings and evidence were designated by appellant. Accordingly, he served his points upon appellees. (R. 22.) The "points" rest upon the single premise of "contributory negligence."

All other *errors* and *points* are excluded from consideration on these appeals.

Appellant assigned no errors concerning the application below in these cases of the "doctrine of the last clear chance." The charge of the Trial Court and all the evidence are not before this Court, even though the "doctrine" was raised by the pleadings (R. 6, 13), evidence thereon submitted and the jury instructed in this regard.

Appellant attempts for the first time to raise the point "that the rule of the last clear chance cannot apply in these cases." In order to argue this contention on appeal it should be subject to an assignment of error and stated as a point in appellant's Statement Under Rule 75 (d).

The reason appellant *must* argue the doctrine inapplicable is obvious. In the trial below the doctrine of the last clear chance was applied. Hence, *even if Mrs. Clark were contributorily negligent, she may still recover*. Realizing this, appellant *now* seeks to argue that the Court below erred in applying the doctrine. *Should this Court find that Mrs. Clark was negligent as a matter of law*, the instructions of the Court below on the doctrine and the facts must be considered proper,¹ and the findings of the jury thereon conclusive.²

Thus, appellant is precluded from questioning the action of the Court below in applying the "last clear chance doctrine."

The overruling of appellant's Motion for Judgment below upon the ground that the verdicts were "contrary to law" because Mrs. Clark was guilty of contributory negligence, in view of the issues submitted,

1. Where there is any evidence showing facts which might warrant submitting a negligence case to a jury under the doctrine of the last clear chance, every presumption favors the correctness of that decision. *Metropolitan Casualty Insurance Co. v. Hoage*, 63 App. D. C. 307, 72 F. (2d) 175. Under the circumstances involved in these appeals, where pleadings raise the doctrine of the last clear chance and evidence thereon is submitted, the instructions (when not questioned and not contained in the record on appeal) below must be assumed proper. *Rhees v. Morris*, 52 App. D. C. 27, 230 Fed. 1001; *Vincent v. United States*, 59 App. D. C. 194, 37 F. (2d) 824, cert. den. 281 U. S. 720.

2. Findings on the issues raised by the application of the doctrine are conclusive. *Robertson v. Washington Ry. & Elec. Co.*, 51 App. D. C. 311, 279 Fed. 180; *United States, etc. v. Stewart*, 2 F. (2d) 936; *Amdur v. Jacobsen*, 57 App. D. C. 181; 187 F. (2d) 831.

presents no question for review on these appeals. *Leapley v. Matthews*, 60 App. D. C. 251, 50 F. (2d) 1015; *Kansas City S. Ry. Co., et al. v. Billingslea*, 116 Fed. 335, 338; *District of Columbia v. Wilcox*, 4 App. D. C. 90, 125; *Concrete Oil Tank Co. v. Menefee*, 61 App. D. C. 63, 57 F. (2d) 429.

Appellee Free from Contributory Negligence.

Mrs. Clark, a pedestrian, arrived at the Chicago Street intersection *first*. Appellant was some distance *behind* her, and when she looked over her shoulder *first* down Nichols Avenue, she did not see appellant's truck. As she looked *secondly* down Chicago Street, the truck came nearer. As the truck was new and equipped with pneumatic tires, it ran *quietly*. As the driver gave *no warning*, she did not *hear* the truck. She proceeded *into or through the cross walk*, not seeing or hearing the truck turn from its course on Nichols Avenue, and was run down.

Mrs. Clark had the right of way (Ex. #5) and had the right to assume the driver of the truck turning into the cross walk being used by her would exercise due care and avoid injuring her.

Bland v. Hershey, 50 F. (2d) 991, 992.

Diamond v. Cowles, 174 Fed. 471.

Walsmith v. Hudson, 77 Colo. 326, 236 p. 783.

Arguments identical with those of appellant were rejected below and on appeal in the *Walsmith* case. The facts in that case parallel the facts here. On appeal the judges unanimously upheld a judgment

against the operator of a motor vehicle who contended the pedestrian had walked into his rear fender.

Every case cited by appellant in support of the contention that Mrs. Clark was negligent as a matter of law is distinguishable on the facts. None of those cases hold a pedestrian is guilty of negligence for failing to see a truck *changing its course without warning behind the pedestrian*.

On the contrary the authorities uniformly hold a pedestrian *is not negligent* under such circumstances.

Walsmith v. Hudson, *supra*.

Diamond v. Cowles, *supra*.

Contributory Negligence a Question of Fact.

It is settled law in this jurisdiction, under the facts here involved, that "the question as to who was negligent * * * was essentially one for the jury."

American Ice Co. v. Moorehead, 62 App. D. C. 266, 66 F. (2d) 792.

In the Moorehead case, under similar facts, except that the negligence of the driver was not so flagrant as here and there was a dispute as to whether the pedestrian was using the cross walk, which is conceded here (B. 2), this Court ruled squarely that the pedestrian had the right of way and "had the right * * * to assume that the driver of a vehicle using the street at the same time would exercise reasonable care to look out for and avoid injuring a pedestrian attempting

to cross the street.” The question of *ultimate* negligence was held to be “essentially” for the jury. The duties of the driver of the vehicle were held to be controlled by this Court’s earlier decision in *Griffith v. Slaybaugh*, 58 App. D. C. 237, 29 F. (2d) 437.

Ultimate negligence being a jury question, the finding of the jury thereon, under appropriate instructions of the Court, is conclusive and cannot be disturbed on appeal.

O’Dea v. Clark, 46 App. D. C. 274.

De Yturbide v. Metropolitan Club, 11 App. D. C. 180, 197.³

No errors having been assigned concerning the instructions given below on ultimate negligence, and the instructions having been omitted by appellant in his record on appeal, the findings of the jury in that regard are not reviewable on appeal.

Shelley v. Wescott, 23 App. D. C. 135.

Neely Elec. Co. v. Browning, 25 App. D. C. 84, 87.

The Doctrine of the Last Clear Chance Is Applicable and Conclusive.

In contending that the doctrine of the last clear chance is inapplicable, appellant argues concurring negligence continuing to the moment of impact precludes its application.

3. A Court finding, such as a general verdict where a jury has been waived, has the same effect as the verdict of a jury. *McCaughn v. Real Estate Co.*, 297 U. S. 606 (1936).

While not admitting this question is involved in these appeals, appellees contend the argument is untenable.

Appellant takes excerpts from certain decisions out of their context, without regard to the facts involved and attempts to apply them to the facts in the cases at bar.

The cases cited are beside the point. They do not involve any question of whether a pedestrian is negligent for failing to see a vehicle approaching *from the rear and turning without audible warning from its course* into the path of the pedestrian.

Appellant's cases clearly are inapplicable as they deal with pedestrians and vehicles proceeding in "their courses" *without deviation* * * * "*to the moment of impact.*"

Appellees differ with the conclusion of appellant that "not one of the" four elements (listed by appellant on page 17 of his Brief) "is present in the case(s) at bar." On the contrary all four elements are present.

Mrs. Clark on entering the cross walk (1) had "come into a position of peril;" (2) appellant saw her about to enter that cross walk while he was admittedly "50 feet" behind her (R. 32), thus becoming "aware not only of the fact, but also that the party in peril (Mrs.

Clark) cannot escape from it, or apparently will not avail (herself) of opportunities open * * * for doing so" (she being unaware of her danger as appellant was behind her); (3) appellant (being 50 feet to 90 feet behind Mrs. Clark) certainly "subsequently" had "the opportunity by the exercise of reasonable care to save" Mrs. Clark "from harm" (such as continuing on his course, slowing down, stopping or sounding a warning); and (4) he failed "to exercise such care," changed his course and did not slow down, stop, or give any warning to Mrs. Clark that he was turning into her path.

Under appellant's own argument the doctrine is applicable.

Moreover, under the facts involved the Court below was plainly right in submitting the cases to the jury on the doctrine of the last clear chance.

Mosso v. E. Stanton Co., 75 Wash. 220, 134 P. 941.

Standard Oil Co. v. McDaniel, 52 App. D. C. 19, 280 Fed. 993.

Chr. Heurich Brewing Co. v. McGavin, 16 F. (2d) 334.

On appeal the evidence will be construed most favorably to the prevailing parties (United States v. Woltman, 61 App. D. C. 52; 57 F. (2d) 418), and as only part of the evidence is in appellant's record on appeal, it is submitted the verdicts should be sustained.

The most appellant can urge is that the evidence is conflicting. Verdicts will not be disturbed because of conflicting evidence.

Rapley v. Shehan, 21 D. C. 152.

Lockwood v. Rucker, 34 App. D. C. 376, 40 App. D. C. 422.

The ultimate question was one of fact and the verdicts below were conclusive. *McCaughn v. Real Estate Co.*, ²⁹⁷~~279~~ U. S. 606.

Conclusion.

Appellant concedes he was negligent. The verdicts below so found and either that Mrs. Clark was not guilty of any contributory negligence, or that, under the doctrine of the last clear chance, appellant's ultimate negligence caused the accident.

Appellees submit that Mrs. Clark was not guilty of contributory negligence, and in any event appellant's ultimate negligence caused her grievous injuries and the judgments below should be affirmed.

Respectfully submitted,

CHAS S. BAKER,
BENJ. L. TEPPER,
WARREN E. MAGEE,
Attorneys for Appellees.

